Supreme Court, U.S.
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No. 97-232

In The

Supreme Court of the United States

October Term, 1996

EDDY POTASH, INC.,

Petitioner,

vs.

JEANNE HARRISON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The only new issue raised by Jeanne Harrison ("Harrison") in Reply to Eddy Potash, Inc.'s ("EPI"), Petition for Writ of Certiorari is the issue of EPI having waived the arbitration issue. Because Harrison is in error on that issue, EPI deems a reply necessary.

THE WAIVER ISSUE

A. EPI has not waived the arbitration issue. Harrison's failure to invoke the arbitration provision and the grievance procedure in the Collective Bargaining Agreement ("CBA") results in a defect in the subject matter jurisdiction.

Harrison begins her Response with the premise that a party seeking to compel arbitration waives its right to arbitrate by participating in litigation for a substantial period of time. Harrison continues with a recitation of factors the Court should examine in determining whether a party has waived its right to arbitration. Harrison fails to address the issue raised by EPI in its Petition for Writ of Certiorari. EPI has not sought to compel arbitration. Rather, EPI raised the issue of Harrison's failure to exhaust contractual remedies in the CBA, thereby resulting in a failure of the court to have subject matter jurisdiction, which is an issue that can be raised at any time under Fed. R. Civ. P. 12(h)(3).

As stated in EPI's Petition for Writ of Certiorari, there existed a CBA at EPI. By means of the CBA, certain terms of employment were reached between EPI and its hourly employees. One of the terms of employment was an employee, such as Harrison, agreed to forego her rights to proceed in the District Court on her employment claims and to pursue those claims through the grievance procedure and arbitration process.

EPI contends Title VII claims were likewise subject to this mandatory process. Therefore, Harrison's remedy was not through the District Court but through the grievance/arbitration procedure contained in the CBA. Her failure to invoke the grievance process and to proceed to arbitration on her Title VII claims resulted in a jurisdictional defect, thereby denying the Court of subject matter jurisdiction. *See Republic Steel Corp. v. Maddox*, 379 U.S. 650, 13 L. Ed. 2d 580, 85 S. Ct. 614, 58 BNA LRRM 2193, 51 CCH LC ¶ 19,458 (1965). *See also Vaca v. Sipes*, 386 U.S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967).

Since 1965, the law has been clear that if a party sidesteps a CBA's grievance/arbitration machinery by suing in federal court without having attempted to invoke the grievance/arbitration process, that party's claim in federal court must be dismissed. The failure to exhaust contractual remedies is not merely an affirmative defense that is waived if not asserted in an answer. Exhaustion of mandatory contractual remedies is a prerequisite to the right of an employee, the union, or an employer to bring a federal court action under § 301 for breach of a collective bargaining agreement. The failure to exhaust can be characterized as a lack of subject matter jurisdiction or as a failure to state a claim upon which relief may be granted. *Republic Steel Corp. v. Maddox, supra*. Harrison's argument that EPI should have raised her alleged failure to exhaust contractual remedies in its Answer or that EPI has, by its actions in the litigation, waived the defense, must be rejected. The failure to exhaust the contractual remedies goes to the Court's subject matter jurisdiction and can be raised at any time by any party or by the Court under Fed. R. Civ. P. 12(h)(3). *Camean v. F/V Lady J*, 654 F. Supp. 709, 712, 107 CCH LC ¶ 10,038 (D.C. Mass. 1985). Federal labor policy requires that individual employees wishing to assert contract grievances attempt to use the contract grievance procedure negotiated by the employer and union as the mode of redress. *Republic Steel Corp. v. Maddox, supra*;

Bonser v. Safeway, Inc., 809 F. Supp 799, 801-02 (D. Colo. 1992). There exists a multitude of cases throughout the United States which recognize that an employee must, as a prerequisite to bringing suit in federal court, attempt to exhaust his contractual remedies as contained in the collective bargaining agreement, *see, e.g., Mitchell v. Pepsi Cola Bottlers, Inc.*, 772 F.2d 342 (7th Cir. 1985), *cert. denied*, 475 U.S. 1047, 89 L. Ed. 2d 575, 106 S. Ct. 1266; *Anderson v. Alpha Portland Industries, Inc.*, 752 F.2d 1293 (8th Cir. 1985), *cert. denied*, 471 U.S. 1102, 85 L. Ed. 2d 846, 105 S. Ct. 2329.

In the present case, Harrison failed to follow the mandatory grievance procedure and arbitration process. Her failure to exhaust the contractual remedies denies the Court of jurisdiction of the subject matter. As the Court is well aware, a claim of lack of subject matter jurisdiction can be raised at any time and subject matter jurisdiction cannot be waived. *Camean v. F/V Lady J, supra.* Therefore, Harrison's argument of waiver fails and should be rejected by this Court in its entirety.

The cases cited by Harrison from various Circuits regarding waiver of the right to compel arbitration completely miss the point as EPI did not seek to compel arbitration but raised an issue akin to failure to exhaust administrative remedies as a prerequisite to the Court having subject matter jurisdiction. The waiver argument should not deter this Court from granting certiorari on a matter of compelling national interest.

CONCLUSION

For the reasons set forth above, as well as those cited in the Petition for Writ of Certiorari, the writ should be granted.

Respectfully submitted,

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